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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1985

CROCKER NATIONAL BANK,
Appellant,

VS.

PAUL PERDUE,
Appellee.

On Appeal from the Supreme Court of the State of California

BRIEF OF THE CALIFORNIA BANKERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF APPEAL

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INTEREST OF THE CALIFORNIA BANKERS ASSOCIATION

The California Bankers Association is the statewide trade association for the commercial banking industry in the State of California. Its membership consists of nearly all of the 450-plus commercial banks in the State of California, including 164 banks chartered by the United States.

This action involves reversal by the California Supreme Court of a judgment of dismissal in favor of a commercial bank chartered by the United States and with principal offices in the State of California. The complaint complained of a returned item service charge against a checking account customer of appellant when the customer wrote a check without depositing sufficient funds in his account, and sought review by the state courts of the amount of this charge. *Amicus,* as a trade association whose members offer deposit accounts to the general public, and whose

nationally-chartered members are subject to the authority and regulations of the Comptroller of the Currency, is directly affected by the decision below to the extent that such decision provides authority for the review and modification, in state court proceedings under California Civil Code § 1670.5, of the price terms on which its members may offer deposit accounts to the general public.

Amicus is also concerned about the potential for conflict between the obligations of its members under the Comptroller's regulations and examination procedures, especially 12 C.F.R. § 7.8000 (1985), and such court-ordered repricing of bank services.

Counsel for both appellant and appellee have expressly consented to the filing of this brief under Rule 36.1. The original letter of consent from each counsel is filed herewith.

SUMMARY OF THE ARGUMENT

If a returned check charge may be so reviewed and modified, then *any* deposit account fee or service charge set by a national (or federally insured state-chartered) bank may be subject to similar state restriction, notwithstanding that such fees are set in the open marketplace in a non-anticompetitive manner. The several fees which are applicable to a deposit account make up the "price" for that account in their totality, not in their separate amounts, and attacks on each separate piece of that totality will lead to multitudinous lawsuits and could lead to widely divergent holdings as to what is a "reasonable" price. In addition, this could result in a less than "reasonable" price being "approved" by state courts when all such cases are combined. The decision below would apparently place federally insured depository institutions, including national banks, partially in the position of a public utility, with their prices limited to "cost" plus a "reasonable" profit (without definition) while not assuring them of an overall "reasonable" rate of return as guaranteed to public utilities.

Commercial bank pricing structures are designed to recover costs of services, show a profit return, encourage some forms of business and discourage others, each bank deciding for itself the

relative importance of these factors for each of its charges. Absent anticompetitive behavior, these are decisions properly left to a free and independent management, not to the state courts. The power to price one's services is fundamental to business and necessarily incident to the powers national banks are given by the National Bank Act to engage in the "business of banking" and to "receive deposits." 12 U.S.C. 24 (Seventh).

Congress itself, and through Congress its federal regulatory creation the Depository Institutions Deregulation Committee, recognized that the Congressionally-mandated phasing out of interest rate restrictions on deposit accounts for all federally insured depository institutions necessarily meant a restructuring of pricing mechanisms in an open market place as well. This intended result—to ensure the safety and soundness of such federally insured institutions by allowing free market conditions to halt the outflow of deposit funds into other, nontraditional forms and entities—may not be invalidated by state court action.

Finally, regulations of the Office of the Comptroller of the Currency (found at 12 C.F.R. 7.8000) and examination practices thereunder are in conflict with the decision below.

For these reasons, we contend that the case at bar presents important questions of Federal law which have not been, but should be, settled by this Court.

ARGUMENT

The Supreme Court of the State of California, in reversing the judgment of dismissal in favor of appellant by the trial court, in effect ruled that the fees and service charges set by a nationally-chartered commercial bank in a competitive marketplace and after full disclosure to the customers of the bank are subject to judicial review by the state courts of California and to being set aside if those state courts find them to be unreasonable (Decision; *see* Appendix A to Appellant's Jurisdictional Statement at 11a-

13a).[1] *Amicus* California Bankers Association respectfully submits that this was error, and that a review by this court is necessary at this time in order to prevent a multitude of lawsuits throughout the nation challenging the several fees and service charges of national banks and other federally insured depository institutions on the same theory, leading either to extraordinary litigation costs incurred by such institutions in defending such attacks or to the inability of such institutions to respond appropriately to market conditions through their individual pricing policies due to a very reasonable fear of such litigation and its *ex post facto* effect.

1. The decision below will result in multitudinous litigation, leaving federally insured depository institutions at significant risk in their price-setting policies for banking deposit services authorized by the National Bank Act and other federal law

Although the decision below does not specifically address any commercial bank fee or charge other than appellant's returned check ("NSF") charge, the rationale of the decision is equally applicable to any fee or service charge established for deposit services by a commercial bank. Deposit accounts frequently involve a number of differing charges, and are not solely priced on the basis of NSF charges. There may or may not be monthly service charges, charges for the provision of checks, for the number of items processed during a given time period (perhaps with a set number being authorized without charge), or for the number of teller-related transactions or automated teller machine transactions, or both, conducted during each time period. Some or all of these charges may be dependent upon whether a specified minimum balance was maintained in the deposit account, or whether the average balance for the time period was above or below a set figure.

In short, the total "price" established by a commercial bank for a simple checking deposit account is an amalgam of a number of

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[1] All references hereinafter to the decision below will cite the appropriate page or pages of Appendix A to Appellant's Jurisdictional Statement.

individual pricing decisions, each designed either (1) to provide the customer with greater flexibility by allowing him or her to find an account with those pricing features which most nearly result in the customer paying for those services he or she really desires, or (2) to encourage the customer into account behavior which is consistent with the legitimate business goals and objectives of the bank.

The decision below, unless reversed, undoubtedly will result in attacks on the pricing policies of commercial banks throughout the country, with widely divergent holdings as to what is a "reasonable" price for not only the same but also the totality of services that go into the overall cost of both checking and nonchecking deposit accounts. If allowed to stand, the decision below will authorize a state court review with respect to the "cost" to a bank to provide the service, the "basis and justification" for the price, and the "true value" of the service (Decision; *see* Appendix A, at 11a).

Such a review would substitute the judgment of the state courts for that of the national bank defendant, not only well after the fact but also well after a marketplace decision in a fully competitive market! Is the California Supreme Court saying, as it apparently is (Decision; *see* Appendix A, at 13a) that in an open marketplace a commercial bank is entitled for its services only to a definite (but as yet undefined) percentage which it may "justify" as profit over and above its (similarly undefined) "cost"? *Amicus* California Bankers Association is unaware of any law or ruling that places commercial (and in particular, national) banks in the position of public utilities (nor does *amicus* urge that position now) and yet, without some prior approval process for fees and charges and a guaranteed return comparable to that which exists for public utilities, such a theory as expounded by the California Supreme Court could destroy the national banking system. *Amicus* submits that as rapidly as one case is disposed of another will surface. If a $6.00 NSF fee is held to be reasonable and not unconscionable, then what about $6.50? $7.00? Or perhaps the next (or even contemporaneous) attack will be on the monthly service charge; or the minimum balance for no-charge checking; etc.

In addition, even after winning such a case a bank would not be safe from attack. It would have to engage in an ongoing, continual review of each and every one of its account fees and charges to make sure that each of them constantly remains "justifiable" with respect to bank "cost" as market conditions and bank operations change. If a $6.00 fee is "justifiable" today and a new procedure implemented by the bank increases its efficiency, would $6.00 still be justified? Arguably not, under the decision below. Or if $6.00 is held *not* "justifiable" but rather only $5.00, and a $1.00 per transaction refund over millions of transactions is ordered, is there to be any consideration for the millions of dollars of fee income foregone by not charging other services to the highest amount "justifiable" as the bank legitimately seeks to encourage some forms of business and discourage others? In other words, are these not decisions which are properly—both in the business sense and under the law—best left to the bank so long as no anticompetitive behavior is involved?

The National Bank Act provides that national banks are authorized to "receiv[e] deposits" and that they possess "all such incidental powers as shall be necessary to carry on the business of banking . . . " 12 U.S.C. 24 (Seventh). This Court, in *Franklin National Bank v. New York*, 347 U.S. 373 (1954), held that these provisions preempted a state law prohibiting the use of the words "saving" or "savings" in a national bank's advertisements, saying:

> We cannot believe that the incidental powers granted to national banks should be construed so narrowly as to preclude the use of advertising in any branch of their authorized business.

Id. at 377.

Certainly, even more fundamental than advertising among the "incidental powers . . . necessary to carry on the business of banking," including that of "receiving deposits," is the power to price that business so long as not anticompetitive or violative of some other federal provision. Therefore, even if the decision below could be sustained as to banks chartered by the State of Califor-

nia[2], it clearly is erroneous with respect to national banks. It is not necessary to pass on the wisdom of Section 1670.5 of the California Civil Code. As this Court stated in *Franklin, supra*:

> However wise or needful New York's policy, a matter as to which we express no judgment, it must give way to the contrary federal policy.

Id. at 379.

2. The decision below is in direct contravention of federal policy established by Congress in the Depository Institutions Deregulation and Monetary Control Act of 1980 and the Garn-St Germain Depository Institutions Act of 1982, and to regulations of the Office of the Comptroller of the Currency which clearly preempt state action to the contrary

In response to the introduction in the late 1970's of money market mutual funds to the marketplace and the tremendous "disintermediation" (outflow of funds from traditional depository institutions to these mutual funds) which then took place because of the interest rate differentials which existed, Congress passed the Depository Institutions Deregulation and Monetary Control Act in 1980 (the "1980 Act"), Pub. L. 96-221, 94 Stat. 132. Under this Act, the interest rate limitations on regulated depository institutions established by Regulation Q of the Federal Reserve Board (12 C.F.R. 217.7) were repealed and a new Congressional creation, the Depository Institutions Deregulation Committee ("DIDC") was instructed by Congress to phase out rate restrictions and let such rates be set by the marketplace. (*See* 12 U.S.C. § 3501). It was full recognized that such a policy would mean a restructuring of pricing mechanisms as well[3], which was

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[2] The propriety of the decision below vis-a-vis state-chartered institutions is, in the opinion of *amicus* California Bankers Association, also subject to challenge, especially in light of the Depository Institutions Deregulation and Monetary Control Act of 1980 and the Garn-St Germain Depository Institutions Act of 1982, at least insofar as those institutions are insured by the Federal Deposit Insurance Corporation.

[3] *See* Appellant's Jurisdictional Statement, pp. 19-21, and footnotes thereto.

subsequently also recognized by DIDC in its consideration of the speed with which the rate differential phase-out ordained by Congress should occur.[4] That pricing mechanism, as indicated *supra*, is comprised of a number of different fees, services and charges and, given the tremendous competition for deposits that exists today throughout the country, flexibility in pricing is essential in order to determine what mix of services and charges will best respond to consumer desires and thus attract deposits. Both Congress, in enacting the 1980 Act, and DIDC, in implementing the same for all federally insured depository insitutions in accordance with its provisions, recognized that market-set interest rates and market-set account fees were necessarily inextricably intertwined. Market-set pricing of the several deposit accounts of all federally insured depository intitutions was thus intended by Congress and DIDC in order to bring about a market-set interest rate structure and may not be invalidated, in whole or in part, by a state court. In this, the court below was in error.

Of particular note, national banks such as appellant are subject to regulation and examination by the Office of the Comptroller of the Currency ("OCC"), and that Office has issued an interpretive Final Rule (appearing at 12 C.F.R. 7.8000, and 48 Fed. Reg. 54319 (December 2, 1983), *amended* 49 Fed. Reg. 28237 (July 11, 1984)[5]) which should be controlling herein and which clearly preempts state laws which may "prohibit [a competitively based]

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[4] *See* Final Rule of the Depository Institutions Deregulation Committee, August 24, 1983, published in 48 Federal Register, at 38455, wherein, in the Supplementary Information set forth with such Final Rule DIDC states:

> Over 40 percent of the commenters [to the December, 1982 proposal to eliminate the remaining rate ceilings or accelerate the deregulation of time deposits] indicated support for some form of accelerated deregulation . . . [These] commenters indicated that deregulation of all accounts would allow depository institutions to price their deposits in a way that would attract funds in the maturity categories that best match the maturities of their loans and investments.

[5] *See* Appendix I to Appellant's Jurisdictional Statement, at pages 76a and 82a.

charge or limit or restrict the amount of that charge".[6] *Amicus* California Bankers Association is strongly concerned that, unless reversed, the decision below will bring into conflict the obligations of its national bank members to comply with the mandate of the OCC in Section 7.8000 that service charges should be high enough to discourage customers from frequently writing checks without sufficient balances with a state court-ordered reduction of NSF charges to a figure based on cost plus a "reasonable" profit. Such a conflict will place amicus' national bank members in an impossible situation.

CONCLUSION

For all of the reasons stated herein, the *amicus* California Bankers Association, on behalf of its member banks, respectfully urges this Court to grant immediate review in this matter.

Respectfull submitted,

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[6] 12 C.F.R. 7.8000, subd. (c).